

IN THE

Supreme Court of the United States

October Term, 1977

No. _____

77-1476

ATLANTIC PRODUCE COMPANY, INC.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

This matter arises under the Perishable Agricultural Commodities Act, 1930, 7 U.S.C. 499a et seq. The Administrative Law Judge, the Honorable John G. Liebert, by decision dated June 24, 1976, found that the respondent, Atlantic Produce Company, Inc., had committed willful, repeated and flagrant violations of Section 2 of the Perishable Agricultural Act, 7 U.S.C. 499b, and ordered that the facts and circumstances to be published. (Appendix Page 1a) Upon timely appeal to the Secretary of Agriculture, the Judicial Officer, Office of the Secretary, rendered his decision on October 5,

1976, again finding that Atlantic Produce Company, Inc., made willful, repeated and flagrant violations of Section 2 of the Perishable Agricultural Act, 7 U.S.C. 499b and ordered that the facts and circumstances shall be published. (Appendix Page 19a) Upon Petition for Review from the Secretary of Agriculture to the United States Court of Appeals for the Fourth Circuit, the United States Court of Appeals for the Fourth Circuit on January 17, 1978, denied the Petition for Review and affirmed the order of the Secretary. (Appendix Page 22a)

JURISDICTION

The date of the judgement of the United States Circuit Court of Appeals for the Fourth Circuit sought to be reviewed is January 17, 1978. There has been no request for rehearing and no request for the granting of an extension of time.

The statutory provision conferring jurisdiction on this Court to review the judgement in question by writ of certiorari is 28 U.S.C. Section 1255(1).

QUESTIONS PRESENTED

1. Do the restrictions in Section 8(b), 7 U.S.C. Section 499h, upon employment of individuals not a party to disciplinary actions and not allowed to be heard at such hearings, violate the constitutional right of due process?

2. Did the disciplinary action against Atlantic Produce Company, Inc., abate as the only sanctions provided as to this entity were to publish the facts and circumstances of such alleged violation and to suspend the license of the offender, where the license of this alleged offender had expired of its own terms prior to the institution of the disciplinary action?

3. Did the acceptance in writing of an assignment for the benefit of creditors and acceptance of monetary payments thereunder constitute "full payment promptly" under the

Perishable Agricultural Commodities Act?

STATUTORY AND CONSTITUTIONAL PROVISIONS

7 U.S.C. Section 499h:

“(a) Whenever (a) the Secretary determines, as provided in section 6, that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated Section 14(b) of this Act, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender;

(b) Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person - -

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 2, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to the right of appeal under section 7(c).

The Secretary may approve such employment at any time following nonpayment of a reparation award, or

after one year following the revocation or finding of flagrant or repeated violation of section 2, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this Act and that the licensee will pay all reparation awards, subject to its right of appeal under section 7(c), which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order."

The Fifth Amendment to the Constitution of the United States:

Article V - "No person shall be * * * deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

7 U.S.C. Section 499b:

"It shall be unlawful in or in connection with any transaction in interstate or foreign commerce- - * * *

(4) * * * or to fail or refuse truly and correctly to account and make full payment promptly in respect to any transaction in any such commodity to the person with whom such transaction is had; * * *"

STATEMENT OF THE CASE

This case involves review of the decision of the Court of

Appeals for the Fourth Circuit which refused to review the decision of the Secretary of Agriculture which applied sanctions against Atlantic Produce Company, Inc. The administrative proceedings were initiated by the complaint of the Department of Agriculture under the provisions of the Perishable Agricultural Commodities Act, 7 U.S.C. Sections 499a-r. After initial proceedings, a full hearing was held on January 7, 1975, before Administrative Law Judge John G. Liebert. At the hearing, it was agreed that as to seven creditors the facts of the transaction, the date of their occurrences and amounts involved were correct as set forth in the complaint. Further evidence showed that as to these seven creditors, complaints for reparations had been filed pursuant to Section 7 of the Perishable Agricultural Commodities Act, 7 U.S.C. Section 499g. These complaints for reparations filed by the creditor's had been closed upon the showing of an agreement in writing signed by the creditors to accept an assignment for the benefit of creditors of Atlantic Produce. Payments in accordance with the general assignment for the benefit of creditors were made by Atlantic Produce and accepted by the creditors. In addition, evidence was produced that Louis Friedman, one of four stockholders and directors of the corporation, was the only director, officer or stockholder owning more than ten percent (10%) of the stock to continue employment in the Perishable Agricultural Commodities field, two others being elderly and one other having obtained employment in other areas. Evidence showed that Louis Friedman did not hold a majority of stock, could not control the destiny of the corporation, sought new capital in an attempt to continue the business which was begun October 20, 1931, but that there was a deadlock with the elderly stockholders who controlled the business and no new loans could be obtained. Therefore, with the advice of counsel and with the recommendation of the accountant that the assets exceeded the liabilities, an orderly liquidation of the corporation was commenced through the assignment for the benefit of creditors.

It was a surprise to him that upon liquidation only forty percent (40%) of the accounts payable could be paid. It was further shown that the license for Atlantic Produce was renewed annually from October 20, 1931, through October 20, 1973, at which time the license terminated. On April 19, 1974, the disciplinary complaint was filed alleging that Atlantic Produce had violated Section 2(4) of the Act by failing to make full payment promptly regarding 222 produce transactions among nineteen (19) sellers. As stated above, by agreement, proof produced related to sixty-five (65) transactions involving seven (7) sellers. The Administrative Law Judge found that Atlantic Produce had engaged in willful, repeated and flagrant violations of 7 U.S.C. Section 499b.

The Administrative Law Judge further stated in his opinion:

"What consequences may flow from this decision is a matter for an initial determination of the Secretary pursuant to Section 499h(b) of the Act. The Secretary, as provided in the Act, makes this kind of determination, i.e., whether as a matter of fact a person is "responsibly connected" and what he would do about it in the circumstances presented. The foregoing discussion and remarks are made solely for the purpose of demonstrating that a decision in this proceeding on the issue presented is not dependent on a prior or simultaneous finding of whether or not Louis Friedman's employment might be restricted. He is not a party to this proceeding."

ARGUMENT

Do the restrictions in Section 8(b), 7 U.S.C. Section 499h, upon employment of individuals not a party to disciplinary actions and not allowed to be

heard at such hearings, violate the constitutional right of due process?

As shown by the evidence, the license of Atlantic Produce Company had expired of its own terms. In addition, all reparation or money claims against Atlantic Produce had been closed. The question then arises, was this vast expense of time, money for expenses and salaries of government attorneys, private attorneys, Administrative Law Judge, Judicial Officer, expenses and time on petition for writ of certiorari, were these expenses and time expended merely as a futile and wasteful gesture? Certainly there was nothing that could be done to Atlantic Produce, it was defunct and had no assets. Therefore, it is submitted that if this whole proceeding has been a futile and wasteful gesture against a defunct and empty corporation, that action should be taken to prevent such waste.

If the government, as it must, admits that the purpose of this whole proceeding was to bring into play the sanctions provided in Section 8 of the Perishable Agricultural Commodities Act, 7 U.S.C. Section 499h, then the constitutional issue is clearly seen. This Section provides in part:

(b) "Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person - -

* * *

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violations of Section 2, * * *

* * *

The Secretary may approve such employment * * * after

one year following the revocation or finding of flagrant or repeated violation of Section 2, if the licensee furnishes and maintains a surety bond in form and amount satisfactory * * *."

This Section of the Perishable Agricultural Commodities Act requires that an individual "responsibly connected" with a licensee who has its license revoked for flagrant and repeated violations must lose his right of employment within the Perishable Agricultural Commodities field for at least one (1) year and perhaps two (2) years. Yet, as ruled by the Administrative Law Judge, the one person, Louis Friedman, who would be forced to lose his employment for a period of at least one year, "is not a party to this proceeding".

It is now settled that the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental influences comes within "liberty" and "property" concepts of provisions of the Fifth Amendment of the United States Constitution which amendment further provides that no person shall be deprived of liberty or property without due process. Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3L.Ed2d 1377; U.S. v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19L.Ed2d 508.

This position was clearly recognized in Birkenfield v. United States, 369 F.2d 491 at 493:

"Due process demands that an individual whose livelihood is threatened by administrative action be given notice and a hearing to fairly rebut the evidence against him. Particularly should this be so in cases where the action of the administrative body, as the regulator of qualifications for an entire field of private employment, may entirely foreclose an individual from employment opportunities."

However, after so clearly recognizing the issue of due process,

Birkenfield would not squarely meet the issue as it held due process was not violated due to there being no questions of fact presented. Where or how questions of fact could be presented by employees "responsibly connected" was not explained. This decision was followed by Zwick v. Freeman, 373 F.2d 110 (2nd Cir.).

Other circuits have more courageously faced this issue. In Marvin Tragash Co. v. United States Department of Agriculture, 524 F.2d 1255 (5th Cir.) and in Quinn v. Butz, 510 F.2d 743 (D.C. Cir.) it was clearly held that the definition of "responsibly connected" in Section 1(9) is rebuttable. The definition in Section 1(9) of the Act is as follows:

"The term "responsibly connected" means affiliated or connected with a commission merchant, dealer or broker as (A) partner in a partnership, or (B) officer, director or holder of more than ten percentum of the outstanding stock of a corporation or association."

The Court of Appeals in the instant matter also stated that Louis Friedman would not be denied his constitutional right to determine whether or not he was "responsibly connected" with Atlantic Produce. It is submitted, that Quinn, Tragash and the decision herein in the Court of Appeals, while attempting to alleviate the constitutional burden, they do not fully allay the constitutional objection and create additional objections.

As previously set out, Louis Friedman was not a party to the disciplinary proceedings instituted by the Department of Agriculture, and at no step thereafter was he allowed to become a party. The statutory structure of the Perishable Agricultural Commodities Act does not provide or appear to have any intent that an individual, such as Louis Friedman, could become a party to the proceedings. Thus, it is further submitted, that there is no provision within the statutory scheme of the Act which allows an employee of the allegedly offending corporation to

receive due process. In addition, at the time the proceedings under attack in this petition were instituted, there was no regulatory provision allowing an individual employee of an allegedly offending corporation to receive a fair hearing as to whether or not he was "responsibly connected".

Formal hearing procedures have now been established for individuals who desire to challenge a determination that they are responsibly connected with an alleged previous violator. 7 C.F.R. Section 47.1-47.5 and 47-49. It is submitted that such an evidentiary hearing, as now provided for, merely tags on another hearing to what becomes an extremely lengthy, laborious and expensive procedure.

It is further submitted that if the Secretary of Agriculture now provides an evidentiary hearing or forum to determine whether an individual is "responsibly connected" that no proper guidelines or standards are provided to determine what constitutes being "responsibly connected". The Department of Agriculture argued before the Court of Appeals for the Fourth Circuit that the evidence conclusively showed Louis Friedman to be "responsibly connected" with Atlantic Produce. In addition as revised as of January 1, 1977, 7 C.F.R 46.12(ff) still states:

" "Responsibly connected" means affiliation as individual owner, partner in partnership, or officer, director or holder of more than ten percent (10%) of the outstanding stock of a corporation or association."

It is submitted that this carries forth the mentality, condemned in Quinn, that Section 1.9 of the Act established a conclusive rule, was irrebuttable and was to be given automatic operation. The Court in Quinn Supra, stated at 755:

"But by the Secretary's construction of Section 1(9), it also smites one who was not only unaware of the wrongdoing but also powerless to curb it."

and at 756:

"But for something as consequential as the initial order of suspension or revocation of license, which traditionally rest on determination of personal fault, it would take more than the bare test and skimpy history of the statute before us to establish that this consequence was intended to be visited on a basis of absolute liability, of liability without either personal fault or a realistic capacity to counteract or obliterate the fault of others."

It is submitted that the constitutional problem herein discussed is not corrected by the evidenciary hearing provided in 7 C.F.R. Section 47.1 et seq even protected with standards and guidelines as to a determination of being "responsibly connected". The constitutional objection of "due process" still remains as it is questionable as to whether an adverse decision in such a hearing is a "final order" within the purview of 28 U.S.C. 2342(2) which provides for the possibility of judicial review.

It is submitted that a writ of certiorari should be granted in the instant case to establish either that the Perishable Agricultural Commodities Act is unconstitutional as to denying due process insofar as effecting the right to a livelihood of an individual "responsibly connected" with an allegedly offending corporation; or, to establish an efficient and proper forum for an evidencial hearing on the issue of being "responsibly connected" and to establish that "responsibly connected" not only in a class composed of an individual owner, partner in a partnership, or officer, director or holder of more than ten percent (10%) of the outstanding stock of a corporation, but that such member of this class, in order to be deprived of his right of a livelihood, must have "personal fault or a realistic capacity to counteract or obliterate the fault of others". Also, to establish that the decision of the Secretary is a final order within 28

U.S.C. 2342(2) providing for judicial review.

Did the disciplinary action against Atlantic Produce Company, Inc., abate as the only sanctions provided as to this entity were to publish the facts and circumstances of such alleged violation and to suspend the license of the offender, where the license of this alleged offender had expired of its own terms prior to the institution of the disciplinary action?

Section 8 of the Act, 7 U.S.C. 499h, clearly provides, upon the finding of violation of Section 2 of the Act, two (2) sanctions. These sanctions are that the Secretary may; (1) publish the facts and circumstances of such alleged violation; and/or (2) suspend the license of such offender for a period not to exceed ninety (90) days except if he finds that the violation is flagrant or repeated, he may revoke the license of the alleged offender.

Obviously, the purpose of publishing the facts and circumstances regarding failure to promptly account and pay is to alert other brokers or growers who might deal with the offending business. Just as obviously, such action in the instant matter would be futile as Atlantic Produce had no license under the Act and, in addition, was a defunct corporation having no assets.

It is just as obvious that suspending the license of Atlantic Produce for ninety (90) days, or after a finding of flagrant or repeated violations, revoking the license, was a futility and nullity as there was no such license. Again, there was no likelihood that the license would be renewed as Atlantic Produce Company had no assets. It is true that this position was not sustained in Fruit Salad, Inc., etc. v. Secretary of Agriculture, 451 F.2d 162 (1st Cir.) and in Quinn v. Butz, *Supra*, (D.C. Cir.). The basis for these decisions was that the statutory scheme provides, upon a finding of flagrant and repeated violations of

the Act, for sanctions upon an individual, responsibly connected with the offending business, to be deprived of his livelihood. As shown in the initial part of this argument, this sanction is either unconstitutional, or, provides an issue to be decided in a subsequent hearing. Therefore, it is submitted that certiorari should be granted to overrule these decisions.

Did the acceptance in writing of an assignment for the benefit of creditors and acceptance of monetary payments thereunder constitute "full payment promptly" under the Perishable Agricultural Commodities Act?

Careful review of Section 2(4), 7 U.S.C. Section 499b of the Act, reveals that the statutory requirement is for the licensee to "make full payment promptly". In the instant case, the licensee, finding it no longer profitable to continue business for a variety of complex reasons, assigned its assets to a trustee for the benefit of creditors. This is a voluntary procedure under State law, and the record clearly showed that all the creditors of petitioner, save one, voluntarily signed and entered into the assignment of assets for the benefit of creditors. The one creditor who did not voluntarily enter into the assignment was paid in full.

The record clearly shows that a number of the creditors of petitioners filed complaints under Section 7 of the Perishable Agricultural Commodities Act, which provides for reparations or orders for money to be paid to the creditors. Based upon the voluntary entering into the assignment for the benefit of creditors, the Department of Agriculture closed all its files on creditors claiming under the reparation's section of the Act. However, after finding that no creditors were due reparations, or orders for repayment of money by petitioner to creditors, the Department of Agriculture, of its own volition, undertook the instant action below for the sole purpose of punishing the one

individual responsibly connected with petitioner.

It is petitioner's position that having found that the creditors were not entitled to a reparations order, or an order for payment of money based upon a claim against petitioner, the Secretary of Agriculture could not thereafter find that the petitioner failed to "make full payment promptly". It is submitted that this is a basic inconsistency. It is further submitted that the creditors having accepted the assignment for the benefit of creditors, and having voluntarily entered into same, received "full payment promptly", and they as well as anyone acting on their behalf are estopped from denying this.

It is finally submitted that the various creditors having no claim against petitioner, that the Department of Agriculture, a governmental agency, has authority only derivatively from the citizens of our country, and can take no steps for punitive action that its citizens, from which the governmental agency derives its authority, cannot take.

A careful review of cases decided under the Perishable Agricultural Commodities Act reveals no decisions where the creditors voluntarily sign an agreement and received monetary payments under the State procedure of an assignment for the benefit of creditors. The cases do show an arrangement under the Federal Bankruptcy Act, Zwick v. Freeman, 373 F.2d 110, followed in Marvin Tragash Co. v. United States Department of Agriculture, Supra, which involved an arrangement under Chapter 11 of the Bankruptcy Act.

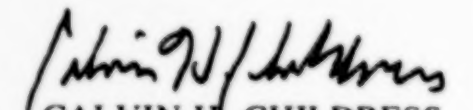
It is submitted that certiorari should be granted in this matter to determine the effect upon creditors of the written acceptance and acceptance of monetary payments of an assignment for the benefit of creditors under State law.

CONCLUSION

Certiorari should be granted to determine whether: (1) the Perishable Agricultural Commodities Act provides due process

for an individual "responsibly connected" with an organization found to be flagrantly and repeatedly violating the Act; (2) if due process objections are cured by providing for an evidencial hearing on the issue of being "responsibly connected", whether such hearing has guidelines as to what constitutes being "responsibly connected", and as to whether an adverse decision can be judicially reviewed; (3) to determine whether disciplinary actions abate where the sanctions against the allegedly offending corporation are futile, empty gestures which are a nullity; and (4) whether acceptance in writing of an assignment for the benefit of creditors and acceptance of monetary payments thereunder by all creditors constitutes compliance under the Act or constitutes an estoppel.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing have been served on all adverse parties by deposit in the mail postage prepaid, and addressed to the Office of the Solicitor General, Department of Justice, Washington, D.C. 20530; George D. Becker, Esquire, Office of the General Counsel, Department of Agriculture, Washington, D.C. 20250; Barbara Allen Babcock, Assistant Attorney General and Leonard Schatman, Attorney, Department of Justice, Washington, D.C. 20530 this the 17th day of April, 1978.


CALVIN H. CHILDRESS

APPENDIX

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

Atlantic Produce Company,
Inc.,

Respondent

PACA Docket No. 2-3303

Decision

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. 499a et seq., hereinafter referred to as the "Act"), instituted by a complaint filed on April 19, 1974, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that Respondent wilfully, repeatedly, and flagrantly violated section 2 of the Act (7 U.S.C. 499b) by failing to make full payment promptly of the agreed purchase prices for 222 shipments of perishable agricultural commodities in interstate commerce which were purchased, received, and accepted without complaint, and seeks a finding of wilful, repeated, and flagrant violations of the Act against Respondent, pursuant to section 8(a) of the Act (7 U.S.C. 499h).

Respondent filed an answer on May 24, 1974. On July 16, 1974, pursuant to § 47.36 of the Rules of Practice (7 CFR 47.1 et seq.) a prehearing conference was filed by the Administrative Law Judge on July 16, 1974.

On September 16, 1974, Respondent filed an amended answer neither admitting nor denying that it purchased, received and accepted the 222 shipments as charged in the complaint, but alleging that it did not violate the payment provisions of the Act because it entered into a settlement agreement with its

shippers, which agreement should be taken as satisfying the payment provisions of the Act. In addition, Respondent's answer set up certain special pleas of limitation and abatement.

Oral hearing on the matter was held in the Federal Courthouse, Norfolk, Virginia, on January 7, 1975, before Administrative Law Judge John G. Leibert. Complainant was represented by Dennis Becker, Esq., and Gregg Radetsky, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., and Respondent was represented by Calvin Childress, Esq., Kelberg & Childress, Virginia Beach, Virginia. Following the hearing the parties were given the opportunity of filing proposed findings of fact, together with briefs and arguments on the facts and law involved. The final brief on the matter was filed by Respondent on June 2, 1975.

THE ISSUES

1. Complainant alleges that Respondent wilfully, repeatedly, and flagrantly violated § 2 of the Act (7 U.S.C. 499b) for its failure to pay promptly and in full for 222 shipments of perishable agricultural products received by it in commerce.

By stipulation of the parties at the hearing, it was agreed that with respect to certain transactions as set forth in the complaint involving Van Bunte Bros., Inc., Ace Brokerage Company, Inc., Oakfield & Elba Growers, Inc., Floyd Wilcox & Sons, Inc., Norfolk Banana Distributors, Inc., Bushman Brokerage, Inc., and F.W. Wilcox and Company, facts of the transactions, the dates of their occurrence and the amounts and persons involved as recited in connection therewith are correct.

2. Respondent contends that after it ceased doing business it entered into a general assignment for the benefit of creditors, to which its creditors including those shown in the complaint, agreed, and that payments were made to sellers of produce along with other creditors. It alleges that the fact of this agree-

ment and the payments made thereunder satisfied as a matter of law the payment provisions of the Act.

3. As a special plea of limitation Respondent contends that § 499f of the Act (7 U.S.C. 499f) imposes a time limitation on this proceeding which requires it to be commenced within 9 months after the cause of action accrues, and that this proceeding cannot lie because it is barred by the aforementioned limitation, viz, the latest transaction recited in the complaint occurred on May 5, 1973, and the complaint herein was not filed until April 17, 1974.

Complaint contends, in substance, that this section of the Act relied on by Respondent is not controlling in this action, being addressed to reparations proceedings which are a type of administrative proceeding separate and distinct from this action on a license.

4. As a special plea in abatement Respondent contends that, since § 499h of the Act (7 U.S.C. 499h) provides that the only sanction is to suspend the license of a licensee for a period of not to exceed ninety days, or, if flagrant, to revoke the license, the fact of no outstanding reparation action (such having been absorbed in the creditors agreement), and the fact that no license is presently held, abates this action.

Complainant contends that as a matter of administration policy and as a matter of law - - this action is not abated for the reasons cited by Respondent.

5. As a special plea Respondent contends that this action should be abated because, under the circumstances of the matter, there is only one individual who was responsibly connected with Respondent who would or could be affected by any sanction imposed, and that this individual was without authority or ability to control the conduct of Respondent at the time of the alleged infractions. It is further contended that a sanction against this individual (which would deprive him of his present employment in the produce industry) would deprive him of his constitutional right of equal protection of the law,

would be unfair, unjust, be in violation of his constitutional right of due process of the law, and would violate his civil rights under the applicable federal statutes.

Complainant contends that this action is brought only against the licensee for revocation of its license under § 499(h) of the Act, and that any further result, or action, is dependent on other proceedings and the consequences of the imposition of other sections of the statute when and if applicable.

FINDINGS OF FACT

1. Respondent, Atlantic Produce Company, Inc., is a Virginia corporation whose last mail address was 3487 Inventor's Road, Industrial Park, Norfolk, Virginia 23502. Pursuant to the licensing provisions of the Act, license No. 003164 was issued to respondent on October 20, 1931. This license was renewed annually to October 20, 1973, at which time the license terminated due to Respondent's failure to apply for renewal.

2. During the period August 1972 through April 1973, Respondent purchased, received, and accepted without complaint 65 lots of fruits and vegetables, all being perishable agricultural commodities, from seven sellers. The total contract price for the 65 lots was \$29,664.72. The Respondent stipulated that the transactions did occur on the dates indicated in the complaint, and that the amounts indicated in the complaint were approximately correct.

Although the complaint alleges 222 transactions involving 19 sellers for a total contract price of \$76,163.65, Complainant agreed to limit its proof to 65 transactions involving 7 sellers for a total contract price of \$29,664.72.

Respondent was in the business of buying and selling produce in commerce throughout the United States and had an annual sales volume of approximately \$1,700,000.

3. In connection with the transactions specified in Finding 2, supra, Respondent failed to make full payment to 6 of the sellers, and the evidence is conclusive that Respondent was without funds to make these payments. Respondent went out of business in late April 1973. Shortly thereafter, as a result of formal and informal reparations complaints filed by various produce creditors, the Department of Agriculture initiated an investigation of Respondent in early May 1973.

4. On or about May 11, 1973, the Respondent executed and delivered to Lee Kelberg, trustee, a deed of assignment conveying all assets of Respondent in trust for the benefit of creditors. The trustee made two partial payments to the above-mentioned seven sellers (as well as to other produce shippers) on October 9, 1973, and March 13, 1974. The amount of these payments was approximately $\frac{1}{3}$ of the total amount due and unpaid at the time the trustee was appointed.

5. The investigation of the Department of Agriculture disclosed that all reparations complaints were disposed of either by agreement to accept, or by acceptance of, the partial distributions by the trustee as a discharge of the total indebtedness due. In only one case was full payment made to the seven produce sellers (Bushman), and he was not paid within 10 days as specified on his invoices. The investigation of the Department of Agriculture and testimony adduced at the hearing disclosed that, while the formal and informal claims were settled by the partial distributions of the trustee, the creditors were impelled to go along with settlement of this matter in order to salvage some of the value of the obligations due.

6. Testimony at the hearing disclosed that, in general, the sellers' arrangements with Respondent were for payment within 10 days, although in all instances this term was not specified on the face of the invoices. In some cases the sellers, as a custom of doing business, considered payment within 30 days to be acceptable. Some evidence was adduced that one of the sellers operated by accepting payment on a seasonal

settlement basis. The evidence discloses, however, that in no case did this latter custom of doing business provide for payment beyond 30 days. However, in no case was there satisfactory proof offered, either in the form of specific written agreement or otherwise, between Respondent and any of the sellers, which provided for special extensions of time for payment, or extensions of credit, beyond the 10 days provided in the regulations issued by the Department of Agriculture covering this matter.^{1/} And further, no evidence was adduced by Respondent to indicate that at the time of shipment any shipper did not expect to be paid in full for the produce shipped and sold by the Respondent.

7. At the time Respondent went out of business, and for six months prior thereto, Lewis Friedman was the President and General Manager of Respondent corporation. The evidence discloses that Mr. Friedman was in charge of the operations on a day-to-day basis and that he owned 25 percent of the stock. The evidence further discloses that Mr. Friedman knew of the precarious position of Respondent's finances for several months prior to its cessation of business, and that many of the unpaid accounts were for shipments received during the last six

1/ The regulations under the Act which were applicable at the time of the violations (7 CFR 46.1 et seq.) set forth standards for payment in section 46.2(aa) as follows:

“(aa) ‘Full payment promptly’ is the term used in the act in specifying the period of time for making payment without committing a violation of the act. ‘Full payment promptly’, for the purpose of determining violations of the act, means:

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

(9) . . . Provided, however, That as an exception to subparagraphs (1) through (9) of this paragraph, the parties may, by express agreement at the time the contract is made, provide a different time for payment and if they have so agreed, then payment within the time provided shall constitute ‘full payment promptly’; Provided further, That the party claiming the existence of such express agreement as to time of payment shall have the burden of proving it.”

months of its operations. Mr. Friedman, also testified that he was aware of section 46.2 of the regulations.

8. Subsequent to Respondent's cessation of business Mr. Friedman accepted employment with another produce company. The other stock holders and officers of the corporation are not presently engaged in the produce business, and they were not actively involved in Respondent's operations on a day-to-day basis during the last several months of Respondent's operations.

CONCLUSIONS

The purpose of the Perishable Agricultural Commodities Act is to suppress unfair and fraudulent practices in the marketing of fresh and frozen fruits and vegetables in interstate commerce. To accomplish this end it provides in part for a system of licensing commission merchants, dealers, and brokers of perishable agricultural commodities in interstate and foreign commerce under the administration of the Secretary of Agriculture. Licensees must pay an annual fee and a license is revokable for cause. Section 499b of the Act (7 U.S.C. 499b) specifies those acts of licensees which constitute unfair conduct. In particular and relevant part section 499b provides:

"It shall be unlawful in or in connection with any transaction in interstate or foreign commerce - -

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or

the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;" (Underscoring added.)

Under the facts as found herein, Respondent, a licensee under the Act, failed to make full payment promptly to seven sellers for 65 shipments of perishable agricultural commodities. The regulations issued by the Secretary of Agriculture, pursuant to section 499o of the Act, clearly sets forth how these statutory terms are to be applied in the administration of the program to carry out the Act. (See fn. 1). It is concluded, therefore, that on the basis of the facts as found herein and § 46.2 of the regulations that Respondent violated section 499b of the Act.

Respondent attempts to avoid the clear meaning of the statutory language, and as interpreted by the Regulations, by arguing that subsequent releases from claims for full payment signed by partially paid sellers and given to the trustee for liquidation of Respondent's assets constitute constructive compliance with the statute. We note however, that the statute provides for no such alternative to full and prompt payment. Moreover, the courts have consistently held that the Act contemplates full payment, not partial payment, as the only manner of complying with the statutory mandate. Indeed, in the leading case under the Act wherein a respondent pleaded satisfaction as a result of a discharge in bankruptcy, the United States Circuit Court of Appeals for the Second Circuit held, in an extensive discussion of the matter at pages 115-117 of its opinion, that

the release of debts obtained as a result of Bankruptcy Act proceedings does not constitute full payment under the Perishable Agricultural Commodities Act (See Zwick v. Freeman, 373 F.2d 110, C.C.A. 2 (1967), cert. den. 389 U.S. 835 (1967)). While it is true that the instant assignment for the benefit of creditors (sellers) is not a bankruptcy proceeding, it is, nevertheless, a similar method of providing discharge of a debtor by payment of only a part of the original obligations. As found in Zwick, partial payment is inimical to the express provisions of the Act. We find no merit, therefore, in Respondent's contention that it made full payment in a manner which would preclude operation of the express provisions of the Act.

Complainant seeks in this action only a determination that the violations of Respondent were repeated and flagrant and seeks to impose the sanction of publication of the facts and circumstances of the violations of the Act by Respondent. In this connection the Act provides:

“§ 499h.

(a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender;” (7 U.S.C. 499h)

In the instant case we conclude that the violations were

repeated. The uncontroverted facts establish that Respondent failed to make "full payment promptly", to seven sellers in 65 transactions. As stated in Zwick v. Freeman, supra, at page 115,:

"Petitioners first contend that their failure to make full payment to their creditors in the 295 transactions . . . inasmuch as the violations were mainly in one short period during the spring and summer of 1964, . . . [that] all the violations should be considered together as one bundle of violations in point of time and not as 'repeated' violations in a continuing series of violations. This is a strained interpretation of a common word which we must interpret in its conventional sense . . . The 295 violations did not occur simultaneously and therefore they must be regarded as 'repeated' violations within the meaning of the [Perishable Agricultural] Commodities Act.

Relevant decisions also hold that a finding of "repeated" violations is appropriate whenever there is more than one violation of the Act. See: In re Harrisburg Daily Market, 20 A.D. 955 (1961), Aff'd. sub. nom. Harrisburg Daily Market v. Freeman, 309 F.2d 647 (D.C. Cir. 1962); cert. denied 372 U.S. 976 (1963).

We conclude, also, that in the instant case the violations were flagrant. The law applicable to a determination of flagrant violations in a situation such as the present one is well established. Again, as stated in Zwick v. Freeman, supra, at page 115;

"It is inconceivable that . . . [respondent was] unaware of its . . . [its] financial condition and unaware that every additional transaction . . . [it] entered into was likely to result in another violation of the [Perishable Agricultural] Commodities Act. It would be hard to

imagine clearer examples of 'flagrant' violations of the statute than were exemplified by . . . [respondent's] conduct."

(See also George Steinberg & Sons v. Earl L. Butz, 491 F.2d 988 (C.C.A. 2, 1974)). The above cited court decisions support and affirm administrative interpretation and policy that failure to pay for perishable agricultural commodities in a substantial number of transactions constitutes not only "repeated" but "flagrant" violations of the Act. See In re Cloud and Hatton Brokerage, 18 A.D. 547 (1959); In re Ripley Vegetable Company, 24 A.D. 360 (1965).

The complaint charges, also, that Respondent "wilfully" violated the Act. On the basis of the facts as found we conclude that Respondent did wilfully violate the Act by its failure to make full payment promptly. Although a finding of wilfulness is not necessary to invoke the requested sanction under the Act when no revocation of a license is sought, Respondent's violations clearly were wilful. The definition of "wilfulness" under the Act has been stated by the Judicial Officer as follows:

"A violation is willful, within the meaning of the term in a regulatory statute, if the violator (1) intentionally does an act which is prohibited, - - irrespective of evil motive or reliance on erroneous advice or, (2) acts with careless disregard of statutory requirements." (In re George Steinberg & Son, 32 A.D. 236, 263; see also In re American Fruit Purveyors, Inc., 30 A.D. 1542 (1971)).

In the present proceeding, wilfulness is clearly shown by the fact that Respondent intentionally purchased approximately \$30,000 worth of produce and thereafter failed to make "full payment promptly" to the sellers. The fact that Respondent was in a difficult financial position does not change the fact that

Respondent purchased large quantities of perishable produce for which it did not have adequate funds to pay. In In re George Steinberg & Son, supra, the respondent argued that his acts were not wilful because he was prevented from paying due to the firm's insolvency. The Judicial Officer held at page 266:

"Respondent's insolvency does not negate willfulness. The Act requires prompt and full payment of perishable agricultural commodities. A licensee is obligated by statute to have sufficient funds to pay for perishable agricultural commodities, or else not buy them.

Section 2 of the Act states (7 U.S.C. 499b):

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce - - .

(4) . . . to fail or refuse truly and correctly to account and make full payment promptly . . .

No exception for insolvency is expressed, and there is no room for one to be implied. The use of the term 'any transaction' is evidence of a clear Congressional intent to include all transactions, whatever the financial condition of the parties."

(See also In re Cloud and Hatton Brokerage, 18 A.D. 545, 549 (1959), wherein respondent's license was revoked for "wilful, repeated, and flagrant violations" notwithstanding the fact that the failure to pay for the produce resulted from respondent's bankruptcy.) We find nothing in the facts of this case to lead us to the conclusion that Respondent's actions were other than wilful.

Respondent argues that this action be should be abated because the complaint was issued more than nine months after the

last transaction and more than nine months after the general assignment for benefit of creditors. We do not agree with Respondent's argument and hold that this action was not abated by the regulations. The Act provides that "the Secretary may make such rules, regulations and orders as may be necessary to carry out the provisions of this chapter, . . ." (7 U.S.C. 499o). Pursuant to this authority the Secretary promulgated the Rules of Practice Under the Perishable Agricultural Commodities Act (7 CFR 47.1 et seq.). Section 47.3 of these regulations in pertinent part provides:

"§ 47.3 Institution of proceedings.

(a) Informal complaints. (1) Any interested person (including any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory, and any employee of the Department) desiring to complain of any violation of any provision of the act by any commission merchant, dealer, or broker may file with the Director an informal complaint. Informal complaints may be made on the basis of either a disciplinary complaint, or a claim for damages, or both. If the informal complaint is to be made the basis of a claim for damages, it must be filed within 9 months after the cause of action accrues; if the informal complaint is not to be made the basis of a claim for damages, it may be filed at any time within 2 years after the violation of the act occurred: Provided, That the 2-year limitation herein prescribed shall not apply to complaints charging flagrant or repeated violations of the act "

Respondent apparently misreads the nine month period in the regulation as applying to this type of disciplinary action, whereas it clearly applies only to those complaints of individuals who are seeking damages under the so-called "repara-

tions authority'' of the Secretary under the Act. The complaint filed herein was issued well within two years period provided for disciplinary actions and seeks as its objection the sanction of publication of the facts constituting the violations, and a finding of violations - - not damages.

Respondent argues, also, that the fact that its license had terminated should abate this disciplinary action, because the only sanction provided under the Act is suspension or revocation of a license. Patently, this contention is without merit because § 499h of the Act provides for an alternative sanction of publication of findings of violation and the facts constituting the violations - - which is the only sanction sought in this proceeding.

Finally, Respondent would seek to abate this proceeding because Lewis Friedman is the only person who could be affected by a determination herein, and alleged that he was powerless to control the affairs of Respondent. Again, we cannot agree with Respondent that this action should be abated for the reason advanced. As found herein, Lewis Friedman was the General Manager of Respondent corporation during the last several months of Respondent's operations during which many of the obligations evidenced herein were incurred. Moreover, Lewis Friedman was "responsibly connected" with Respondent as that term is defined in the Act. Section 499(a) (9) of the Act reads:

"(9) The term 'responsibly connected' means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association; . . ."

Lewis Friedman, as found herein, owned 25 percent of the stock of Respondent and was its General Manager.

Section 499h(a) of the Act provides that:

“ Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, * * * the Secretary may publish the facts and circumstances of such violation * * * ”

Section 499h(b) of the Act provides:

“(b) Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person - -

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety

bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increase amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section."

In accordance with the above-quoted sections of the Act it is clear that Lewis Friedman may have restrictions placed on his employment as a result of a determination herein that Respondent repeatedly and flagrantly violated § 499(b) of the Act - - because he was "responsibly connected" with Respondent. However, this is clearly the intent of the Act, and the effect of the provisions in restricting Mr. Friedman's employment would not violate any legal right or due process rights of Lewis Friedman. The law on this matter is well settled. (See Birkenfield v. United States and Orville Freeman, Secretary of Agriculture, 369 F.2d 491 (1966)). In George Steinberg & Son v. Butz, supra, the court held at page 994:

"[4] Section 8(b) of PACA, 7 U.S.C. § 499h(b), is constitutional. The restriction upon employment of any person who is or has been reasonably connected with a licensee who has been found to have committed any flagrant or repeated violations of the Act has been held by this court neither to violate the due process clause of the fifth amendment nor to constitute a bill of attainder. We have nothing to add to what has already been said in *Zwick v. Freeman*, 373 F.2d at 118-120. See also *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966)."

As pointed out at the hearing by the Administrative Law Judge the matter of Lewis Friedman's possible employment restrictions is not at issue in this proceeding. This proceeding is one solely to determine whether or not Respondent corporation, as a licensee, violated the provisions of § 499b of the Act. What consequences may flow from this decision is a matter for an initial determination of the Secretary pursuant to § 499h(b) of the Act. The Secretary, as provided in the Act, makes this kind of determination, i.e., whether as a matter of fact a person is "responsibly connected" and what he would do about it in the circumstances presented. The foregoing discussion and remarks are made solely for the purpose of demonstrating that a decision in this proceeding on the issue presented is not dependent on a prior or simultaneous finding of whether or not Lewis Friedman's employment might be restricted. He is not a party to this proceeding. Therefore, there is no merit to Respondent's contention that this proceeding is abated for the argument advanced by Respondent.

On the basis of the foregoing findings and conclusions that Respondent repeatedly, flagrantly and wilfully violated the provisions of § 499b we hold that the facts and circumstances involved should be published.

The foregoing findings and conclusions have been made

after full consideration of the entire record and all evidence received therein. All motions, objections, contentions or arguments presented by the parties have been considered and, whether or not specifically mentioned herein, to the extent they are inconsistent therewith are denied, or found to be without persuasive merit.

ORDER

Respondent has committed wilful, repeated and flagrant violations of the § 2 of the Act (7 U.S.C. 499b).

The facts and circumstances as set forth herein shall be published.

This order shall be effective on the 11th day after service on the Respondent.

Copies hereof shall be served on the parties.

This decision will become final without further procedure 35 days after service hereof, unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 47.37(c) and 47.39(a) and (c) of the Rules of Practice.

John G. Liebert
Administrative Law Judge

June 24, 1976

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

Atlantic Produce Company,
Inc.
Respondent

PACA Docket No. 2-3303

Decision and Order

In this disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), Administrative Law Judge John G. Liebert filed an initial decision on June 24, 1976, in which he found that the respondent committed wilful, repeated and flagrant violations of § 2 of the Act by failing to pay six sellers promptly and in full in 64 transactions involving a total contract price of about \$29,000. (A seventh seller, involving about \$600, was paid in full, but not promptly). The respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to the Administrative Procedure Act has been delegated (37 F.R. 28475; 38 F.R. 10795).^{1/}

With one exception, respondent raises issues which have previously been decided adversely to respondent's position. The one exception is respondent's argument that Judge Liebert interfered in the conduct of the hearing "to the extent that he was no longer an impartial judge but carrying out the role of the prosecutor," and that "his interference in the conduct of the trial violated the canons of judicial ethics * * * and rendered his decision nugatory" (Appeal, p. 22). However, a careful review

^{1/} The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1970 *ed.*, Appendix, p. 550).

of the record does not support respondent's position. Qf. National Labor Relations Board v. Remington Rand, Inc., 94 F.2d 862, 873 (C.A. 2), certiorari denied, 304 U.S. 576.

Respondent's other issues are discussed in Judge Liebert's decision, which is adopted by reference and included in the Appendix to this decision. The Order entered in this proceeding is identical to the Order proposed by Judge Liebert.

It has repeatedly been held that the inability to make payment promptly for produce because of financial difficulties does not negate wilfulness or a violation of the Act. In re Maure Solt, 35 Agr Dec. ____ (decided July 1, 1976); In re Sam Leo Catanzaro, 35 Agr Dec 1879, 1883 (1975); In re Southwest Produce, 34 Agr Dec 160, 167-168, 172 (1975); affirmed sub. nom. Southwest Produce, Inc. v. Butz, 524 F.2d 977 (C.A. 5); In re J. Acevedo & Sons, 34 Agr Dec 120, 130 (1975), affirmed sub nom. J. Acevedo & Sons v. United States, 524 F.2d 977 (C.A. 5); In re George Steinberg & Son, Inc., 32 Agr Dec 236, 266-268 (1973), affirmed sub nom. George Steinberg & Son, Inc. v. Butz, 491 F.2d 988 (C.A. 2), certiorari denied, 419 U.S. 830.

Similarly, a plan of arrangement under which creditors accept less than full payment in full satisfaction of their claims does not negate a violation of the Act. In re King Midas Packing Co., supra, 34 Agr Dec at 1884-1886; In re M. & H. Produce Co., 34 Agr Dec 700, 733-739 (1975), appeal pending; In re Marvin Tragash Co., 33 Agr Dec 1884, 1887-1888, 1892, 1896, 1899-1900 (1974), affirmed sub nom. Marvin Tragash Co. v. United States Dept. of Agri., 524 F.2d 1255 (C.A. 5).

The license of a firm can be suspended or revoked for a past violation even though the license terminates before the Order is issued. In re M. & H. Produce Co., supra, 34 Agr Dec at 750; In re J. Acevedo & Sons, supra, 34 Agr Dec at 138-140; In re George Steinberg & Son, Inc., supra, 32 Agr Dec at 250-253. Similarly, a finding can be made and published that a firm violated the Act even though its license terminates before the

Order is issued. In re M. & H. Produce Co., supra, 34 Agr Dec. at 707, 748-751, 761; In re Marvin Tragash Co., supra, 33 Agr Dec at 1887, 1894, 1914; In re George Steinberg & Son, Inc., supra, 32 Agr Dec at 251-253, 270.

The argument made by respondent that the only effect of making and publishing a finding that respondent violated the Act will be to prevent one individual from engaging in the produce business for a year was also made and rejected in In re King Midas Packing Co., supra, 34 Agr Dec at 1887-1888; In re Marvin Tragash Co., supra, 33 Agr Dec at 1900; and In re George Steinberg & Son, Inc., supra, 32 Agr Dec at 245-254.

ORDER

Respondent has committed wilful, repeated and flagrant violations of § 2 of the Act (7 U.S.C. 499b).

The facts and circumstances as set forth herein shall be published.

This Order shall be effective on the 11th day after service on the respondent.

Done at Washington, D.C.

October 5, 1976

Donald A. Campbell
Judicial Officer
Office of the Secretary

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 76-2344ATLANTIC PRODUCE COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
Secretary of The Agriculture,
Respondents.

Upon Petition for Review of an Order
of the Secretary, U.S. Department of Agriculture.

Argued December 7, 1977 Decided January 17, 1978

Before HAYNSWORTH, Chief Judge;
BUTZNER, Circuit Judge, and
FIELD, Senior Circuit Judge.

Calvin H. Childress (Kelberg and Childress on brief) for
Petitioner; George D. Becker, Attorney, Office of General
Counsel, Department of Agriculture (Barbara Allen Babcock,
Assistant Attorney General; Leonard Schaitman, Attorney,
Department of Justice; Jame Michael Kelly, Assistant General
Counsel; Raymond W. Fullerton, Director, Litigation
Division; Bonnie L. Luken, Attorney, Office of General
Counsel, Department of Agriculture on Brief) for Respondents.

PER CURIAM:

The petitioner, Atlantic Produce Company, Inc., seeks review of a final decision and order by the Secretary of Agriculture which found that the petitioner had committed willful, repeated, and flagrant violations of Section 2 of the Perishable Agricultural Commodities Act, 7 U.S.C § 499b (4).

We have carefully considered the several issues raised by the petitioner and find them to be without merit. Accordingly, we deny the petition for review and affirm the order of the Secretary. We emphasize, however, that our affirmance of the Secretary's order shall in no way prejudice the rights of Louis Friedman or any other individual against whom the Secretary might seek to impose the penalty of prohibition of employment in the industry under the provisions of Section 8(b) of the Act, 7 U.S.C. § 499h(b), as a person who has been "responsibly connected" with the corporate petitioner. See *Marvin Tragash Co. v. United States Dept. of Agriculture*, 524 F.2d 1255 (5 Cir. 1975).

PETITION DENIED

No. 77-1476

Supreme Court, U.S.
FILED

JUN 15 1978

WILLIAM H. ROBERTS, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

ATLANTIC PRODUCE COMPANY, INC., PETITIONER

v.

**UNITED STATES OF AMERICA AND
THE SECRETARY OF AGRICULTURE**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

**BRIEF FOR THE RESPONDENTS
IN OPPOSITION**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1476

ATLANTIC PRODUCE COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND
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*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

**BRIEF FOR THE RESPONDENTS
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22a-23a) is not reported. The decision and order of the Secretary of Agriculture (Pet. App. 19a-21a) are reported at 35 Agr. Dec. 1631. The decision of the administrative law judge (Pet. App. 1a-18a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1978. The petition for a writ of certiorari was filed on April 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 8(b) of the Perishable Agricultural Commodities Act, 7 U.S.C. 499h(b), unconstitutionally deprives petitioner's former president of future employment opportunities.

STATEMENT

Petitioner was licensed as a fruit and vegetable dealer under the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a *et seq.* Section 2(4) of that statute, 7 U.S.C. 499b(4), requires dealers to "make full payment promptly" in transactions involving perishable agricultural commodities. The Secretary filed a disciplinary complaint charging that petitioner had failed to make prompt payment to several creditors from whom it had purchased numerous shipments of fruits and vegetables.

After a hearing, an administrative law judge found that petitioner had committed the violations charged (Pet. App. 1a-18a). On administrative review, the Secretary, acting through his Judicial Officer, adopted the decision of the administrative law judge (Pet. App. 19a-21a). As a sanction, the Secretary ordered the publication of the facts and circumstances of petitioner's violations, as provided in Section 8(a) of the Act, 7 U.S.C. 499h(a). The court of appeals affirmed, observing that its decision did not prejudice the rights of any person who may be subject to sanctions because of his connection to petitioner (Pet. App. 22a-23a).

ARGUMENT

In pertinent part, Section 8(b) of the Act provides that, except with the approval of the Secretary, licensees under the Act may not employ any person "responsibly connected" to a person found to have committed flagrant or repeated violations of Section 2. Section 1(9) of the statute, 7 U.S.C. 499a(9), defines the term "responsibly connected" to mean

affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association * * *.

Under Section 8(b), one year must pass following a finding of flagrant or repeated violation of Section 2 before the Secretary may approve a licensee's employment of a person "responsibly connected" to the violator. At that time, the Secretary may approve such employment only if the employer-licensee furnishes a surety bond satisfactory to the Secretary guaranteeing that the employer's business will be conducted in accordance with the Act. Two years after a finding of flagrant or repeated violation, a surety bond is no longer a prerequisite for the Secretary's approval of a licensee's employment of a person "responsibly connected" to the violator. Licensees who employ such "responsibly connected" persons without the Secretary's approval are subject to suspension or revocation of their licenses if they retain the employees after notice from the Secretary.

At the time petitioner violated Section 2(4) of the Act, Louis Friedman was petitioner's president and general manager. He also owned 25 percent of petitioner's corporate stock. He was thus "responsibly connected" to petitioner within the meaning of Section 1(9). Petitioner is defunct (Pet. 12; Pet. App. 5a-7a), and Friedman apparently has obtained employment with another firm licensed to do business under the Act (Pet. App. 7a). Petitioner now contends (Pet. 6-12) that Section 8(b) deprives Friedman of due process of law by seriously diminishing his prospects for continued employment with a licensee after appellate review of the Secretary's decision is completed. Petitioner argues that Friedman was not a party to the administrative proceedings at which

petitioner was found to have flagrantly and repeatedly violated Section 2,¹ and that therefore Friedman should not suffer adverse consequences as a result of the Secretary's decision.

The court of appeals correctly rejected petitioner's argument. In the first place, petitioner may not challenge the constitutionality of Section 8(b) on the basis of the statute's potential effect on Friedman. The alleged injury of which petitioner complains will affect only Friedman and will involve no harm whatever to petitioner. Petitioner is no longer an active corporation licensed to deal in perishable agricultural commodities and, accordingly, does not itself have an interest in employing Friedman. Petitioner has asserted no other stake in the validity of Section 8(b) and therefore may not attack the statute in this case.

Moreover, petitioner's objections to the statute are groundless. The administrative law judge found that, during the nine-month period from August 1972 to April 1973, petitioner purchased and received 65 lots of fruits and vegetables from seven sellers. The total contract price for these perishable commodities was nearly \$30,000. Petitioner failed to make full payment to six of the seven sellers and finally went out of business in April 1973.² After petitioner assigned its assets to a trustee for the benefit of creditors, the six sellers received approximately one-third of the amount due and unpaid at

¹Friedman did appear and testify as a witness for petitioner at the administrative hearing (Pet. App. 7a).

²Under the arrangements between petitioner and the sellers, and under the Secretary's regulations (7 C.F.R. 46.2(aa)), full payment was to be made within ten days after acceptance of the produce. Evidence adduced before the administrative law judge indicated that at least some sellers considered payment within 30 days acceptable (Pet. App. 5a).

the time the trustee was appointed (Pet. App. 4a-5a). Petitioner does not challenge any of these findings, and they are sufficient to establish flagrant and repeated violations of the prompt payment provision in Section 2(4). See *Zwick v. Freeman*, 373 F. 2d 110 (C.A. 2), certiorari denied, 389 U.S. 835; *George Steinberg and Son, Inc. v. Butz*, 491 F. 2d 988 (C.A. 2), certiorari denied, 419 U.S. 830; *In re Harrisburg Daily Market, Inc.*, 20 Agr. Dec. 955, affirmed *sub nom. Harrisburg Daily Market, Inc. v. Freeman*, 309 F. 2d 646 (C.A. D.C.), certiorari denied, 372 U.S. 976.³

Friedman did not attempt to intervene in this case. One court of appeals has suggested that a person who may be "responsibly connected" to an alleged violator of Section 2 should be given an opportunity to defend against charges of repeated and flagrant violation, especially in situations where the alleged violator chooses not to assert any defense on its own behalf. See *Quinn v. Butz*, 510 F.

³Petitioner argues (Pet. 13-14) that it made "full" prompt payment to its creditors, within the meaning of the statute, when the creditors accepted partial payment from the trustee several months after petitioner received the fruit and vegetables it had ordered. This contention is without merit. See *Zwick v. Freeman*, *supra*; *Marvin Tragash Co. v. United States Department of Agriculture*, 524 F. 2d 1255 (C.A. 5).

Petitioner also maintains (Pet. 12-13) that the Secretary was foreclosed from pursuing disciplinary action against it because its license to do business under the Act had expired before the Secretary filed his complaint. This argument is incorrect. See *Quinn v. Butz*, 510 F. 2d 743 (C.A. D.C.); *Fruit Salad, Inc. v. Secretary of Agriculture*, 451 F. 2d 162 (C.A. 1). If, as petitioner asserts, it has no future interest in the business, it could have no reason to contend that administrative proceedings must abate on expiration of its license. The Secretary, on the other hand, has a substantial interest in resolving allegations of misconduct, particularly when the corporation or its principals may seek to reenter or remain in the regulated industry; persons who intend to retire from the agricultural commodities business may change their minds.

2d 743, 751 (C.A. D.C.). Significantly, neither petitioner nor Friedman has identified any defense that was omitted and that might have been advanced if Friedman had been a party to the administrative proceedings.

What is more, any disputed questions concerning the nature of Friedman's relationship with petitioner remain open, and Friedman is free even now to show that he was not "responsibly connected" to petitioner. The court of appeals in *Quinn* held that even a person who falls squarely within the statutory definition of "responsibly connected" must be permitted to present evidence intended to prove lack of actual responsibility for violations of the Act. In response to the *Quinn* decision, the Secretary has established a hearing procedure designed to determine whether a person is in fact responsibly connected to a licensee under the Act. See 7 C.F.R. 47.47-47.68. Friedman has not sought to avail himself of this procedure, and he has not denied his responsible connection to petitioner.⁴

In affirming the Secretary's order in this case, the court of appeals emphasized that its decision should not be understood to "prejudice the rights of Louis Friedman or any other individual against whom the Secretary might seek to impose the penalty of prohibition of employment in the industry under the provisions of Section 8(b) of the

⁴The rules of practice governing evidentiary hearings on responsible connection were not in effect when the administrative complaint was issued in this case, but they were in place before the Secretary announced his decision. Shortly after the complaint was issued (despite the fact that the rules had not yet been formally promulgated), Friedman received written notice that he would be permitted to present evidence on his own behalf to agency officials. See Brief for Respondents in the court of appeals, at page A-7.

Act * * * (Pet. App. 23a). Friedman thus has not been deprived of a meaningful hearing on any issue relevant to the statutory restrictions on his future employment.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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